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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION

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BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION

INTEREST OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law center with more than 120,000 members and supporters throughout the United States. WLF engages in litigation and administrative proceedings in matters promoting the free enterprise system and the economic and civil liberties of individuals and businesses.

WLF has a record of longstanding interest and involvement regarding the controversial issues of affirmative action, racial quotas, and reverse discrimination.

Firmly committed to the great principle that our Constitution is color-blind, WLF has consistently opposed the self-contradictory notion that affirmative action plans, supposedly designed to assure *equal* opportunity, may legally justify intentional discrimination against individuals because of the color of their skin.

In its pursuit of its view that the equal protection clause and the civil rights laws protect all citizens against discrimination, WLF has filed briefs *amicus curiae* in many of the leading Supreme Court cases in the area. *See e.g., Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

The Lincoln Institute for Research and Education was founded in 1978 to study public policy issues that impact on the lives of black middle America, and to make its findings available to elected officials and the public.

The Institute, based in Washington, D.C., aims to re-evaluate those theories and programs of the past decades which were highly touted when introduced, but have failed to fulfill the claims represented by their sponsors —and in many cases, have been harmful to the long-range interest of blacks. The Institute is dedicated to seeking ways to improve the standard of living, the quality of life and the freedom of all Americans.

STATEMENT OF THE CASE

Appellee J.A. Croson Company ("Croson") is incorporated in the State of Ohio but has its principal place of business in Richmond, Virginia. Because at least 51 percent of the stock of the corporation happens to be owned by a nonminority, Croson's bid of $126,530.00 for the plumbing project, which was the only bid submitted, was rejected by the City. Had Croson been owned and controlled by an Eskimo, Aleut, Black, or Indian, the City would have accepted Croson's bid because under

Richmond's Minority Utilization Plan ("Plan"), the requirement that a minimum of 30 percent of a prime contract be subcontracted to minorities is satisfied if the prime contractor is owned by a minority. Richmond, Va. Code Ch. 24.1, art. VIII-A (1983).

Because Croson was not minority-owned, the only other way Croson could obtain the contract was to subcontract at least 30 percent of the dollar value of the contract to a company whose owner happens to be a minority member. Richmond, Va. Code Ch. 24.1, art. VIII-A(A). Although Croson was ready, willing and able to perform the entire contract at the bid price of $126,530.00, a minority-owned subcontractor eventually responded to Croson's request for quotes which would increase the cost of Croson's bid by some $7,000, or approximately 6 percent. The City denied Croson's requests both to raise its original bid to satisfy the minority subcontract requirement and to waive the requirement.

The Court of Appeals for the Fourth Circuit ruled on remand from this Court that the Minority Utilization Business Plan on its face violated the Equal Protection Clause [1] because there was no evidence of discrimination by the City of Richmond as required by *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), little evidence of any discrimination at all in the construction industry, and that in any event, the Plan was not nar-

[1] Even though Croson is an Ohio corporation, it is well-settled that a corporation is a "person" under the Equal Protection Clause as well as the Due Process Clause of the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). Only the Privileges and Immunities Clause, which refers to "citizens" rather than "persons" does not apply to corporations. *Id.* *Amici* note however, that most businesses whether minority or nonminority owned, are either sole proprietorships or partnerships, with the corporate form of ownership accounting for less than 5 percent of the types of ownership. *See* U.S. Bureau of the Census *1982 Characteristics of Business Owners* 16 (1985).

rowly tailored to redress any alleged discrimination. 822 F.2d 1355, 1360 (4th Cir. 1987).

SUMMARY OF THE ARGUMENT

The competitive bidding system is inherently nondiscriminatory and race-neutral. The City, in awarding prime contracts, and the prime contractor, in awarding subcontracts, do so on the basis of the lowest bid, not the color of the skin of the bidder. It is no surprise, therefore, that the City could not show any discrimination committed by it or by the local contracting industry. The casual resort by the City to a few statistics to "prove" discrimination is riddled with errors.

Among other things, the City mistakenly looked at only the amount of prime contract dollars awarded to minority-owned firms rather than the more relevant amount of all subcontract dollars. In addition, the City erroneously compared the dollar amount of contracts awarded to the minority population as a whole, rather than the number of minority construction contractors. It is simply absurd to conclude that because Richmond's population is approximately 50 percent black, that 50 percent of all owners of construction contracting businesses should be black. The set-aside program is thus a politically motivated scheme that simply prefers certain racial classes over others and is therefore violative of the Equal Protection Clause.

Even if there were pervasive, identified discrimination in the construction industry as the City simply concludes without any proof, the set-aside program is not narrowly tailored to remedy this perceived problem. Rather, the program simply provides an economic windfall to certain persons based on their race and is counterproductive and morally repugnant.

ARGUMENT

I. THERE HAS BEEN NO FINDING OR CREDIBLE EVIDENCE OF IDENTIFIED DISCRIMINATION BY THE CITY OF RICHMOND OR THE LOCAL CONSTRUCTION INDUSTRY.

In its haste to adopt a 30 percent minority set-aside program for its contracting practices, the City of Richmond made only a passing stab at trying to justify it at the City Council hearing where it was adopted.[2] Even the *post hoc* attempt to do so in its brief before this Court fares no better. Not only did the City of Richmond utterly fail to find that it had discriminated against minorities in its contracting practices, there was no finding or evidence of discrimination by the local construction industry against minorities. Nor is there even an allegation of "societal" discrimination against minorities. Rather, *amici* submit there are a number of legitimate nondiscriminatory reasons to explain the level of minority-owned businesses in the construction industry.

A. There Has Been No Finding That The City Of Richmond Has Discriminated Against Minorities In Its Contracting Practices.

No one disputes the fact that there has been no finding of discrimination by the City of Richmond against minorities in its contracting practices. The failure to find any discrimination by the City comes as no surprise. The competitive bidding process is inherently nondiscriminatory. Companies are awarded contracts by the City on the basis of the lowest bid. The City does not care whether the responsive and responsible bidder was a company that was owned by a person or persons who

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[2] The City Council meeting and public hearing at which the alleged problem of discrimination and the remedial Plan was debated and enacted, took a mere one hour and forty-five minutes. *See* City Brief at 4, n.3.

were white, black, Spanish-speaking, Indian, or Eskimo. Unlike the employment context where arguably the subjective impressions and biases of the employer may come into play in the employment decision, the City looks at the numbers on the bid sheet, not the numbers in the minority population pool. Because there has been no finding of discrimination by the governmental unit involved, the City cannot justify an arbitrary plan which prefers prime contractors who are minority-owned or requires *at least* 30 percent of a contract awarded to a nonminority to be given to minority subcontractors. As a plurality of this Court held in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and as properly followed by the Fourth Circuit below:

> This Court never held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination *by the governmental unit involved* before allowing limited use of racial classifications in order to remedy such discrimination.

476 U.S. at 274 (emphasis added). Because there was no finding of any discrimination by the City of Richmond, it could not set up a racially conscious plan. *Accord Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987).[3]

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[3] *Amici* take exception to the City's reliance on *Fullilove v. Klutznick*, 448 U.S. 448 (1980), for a number of reasons. In the first place, we believe *Fullilove* was wrongly decided and agree with Justice Stevens' dissenting opinion therein that the goal of society is "to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race." *Fullilove*, 448 U.S. at 547 (Stevens, J., dissenting). Secondly, *Fullilove* was only a facial challenge to the Public Works Employment Act of 1977, and Chief Justice Burger cautioned that the case did not address an application of a set-aside program. 448 U.S. at 486. Third, as noted *infra*, Congress was legislating on a national scale pursuant to its constitu-

B. There Was No Credible Or Convincing Evidence Of Discrimination By The Local Contracting Industry.

Recognizing that the City has not engaged in discrimination, the City next argues that *Wygant* is inapplicable to this case and that the existence of discrimination by a vaguely defined "contracting industry" is sufficient to set up a race-conscious contracting system. The City argues that it was a "passive participant in that discrimination" and can therefore institute its race-conscious plan without violating the Equal Protection Clause. City Brief at 40. *Amici* submit that even if *Wygant* does not control this case—although we maintain that it does—and that discrimination by the governmental unit involved need not be found, the City of Richmond has nevertheless failed to provide credible or convincing evidence that there was, as it now claims, "identified, purposeful discrimination in Richmond's construction industry that had caused an extraordinary racial imbalance in the awarding of city construction contracts." City Brief at 40.

The flimsy evidence that the City claims demonstrates that the local construction industry discriminates against minorities does not even come close to the requisite level of the convincing evidence which this Court has held is necessary to justify a limited race-conscious plan. *See, e.g., Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S.Ct. 3019 (1986) (union found guilty by compelling evidence of actual repeated and "egregious" violations of Title VII). The proper level or standard of judicial review in a case like this is one of "strict scrutiny" in examining both the factual predicate of discrimination and whether the plan is "narrowly tailored" to remedy the discrimination and no more. As Justice

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tional powers and its findings cannot be conveniently "borrowed" for Richmond. Finally, this Court's recent decision in *Wygant*, which compelled this Court to remand the case to the Fourth Circuit in the first place, limits the reach of *Fullilove*. *See also J. Edinger & Son, Inc. v. City of Louisville, Ky.*, 802 F.2d 213, 215 (6th Cir. 1986).

O'Connor correctly noted in her concurring opinion in *Wygant*, "This standard reflects the belief, apparently held by all members of this Court, that racial classification of any sort must be subjected to 'strict scrutiny,' however defined." *Id.* at 1852, citing the various opinions in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). As will be demonstrated, the Richmond Plan does not even survive casual judicial scrutiny.

As the abbreviated City Council hearing on the adoption of the Plan (reproduced in the Joint Appendix) clearly demonstrates, the only so-called "evidence" of discrimination by the local contracting industry was the meaningless statistic that Richmond's minority population, primarily black, constitutes approximately 50 percent of the total Richmond population, whereas less than 1 percent of the dollar amount of the City's *prime* contracts were awarded to the lowest bidder who happened to be minority-owned. *See* J.A. 41. The other meaningless statistic adduced during the hearing and prominently reproduced in chart form on page 22 of the City's brief, is the breakdown of the composition of members in some of the various contractor trade associations in the Richmond and Virginia area that shows only a handful of black members belonging to those organizations. From these two meager and meaningless statistics, the City leaps to the facile conclusion that there is "pervasive" and "identified, purposeful discrimination in Richmond's construction industry . . ." City Brief at 40. This is utter nonsense.

1. *There Mere Fact That Few Minority Owned Construction Firms Belong To Certain Contracting Trade Associations Is No Evidence Of Discrimination By The Local Construction Industry.*

Throughout the short City Council hearing, much attention was focused upon the fact that only a handful of black-owned firms belonged to certain construction

trade associations, and in some cases, none at all. If the City of Richmond is implying that these trade associations discourage or do not allow black-owned construction firms to join as members, the City is clearly wrong. The unrebutted testimony of the various representatives who testified at the City Council hearing indicates that they welcome minority members and have sought them out, but that they apparently do not want to join. *See, e.g.*, J.A. 38 (statement of Al Shuman). In addition, it would be violative of the anti-discrimination laws to exclude minority members. *See* 42 U.S.C. 2000e (1982); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). There is not a scintilla of evidence of any complaint or lawsuit filed by any minority charging that he or she was refused membership in any of the trade associations listed in the City's brief. Accordingly, these bald membership figures are completely irrelevant and do not lend any support to the *ipse dixit* by the City that "identified, purposeful discrimination" exists in the construction industry. City Brief at 23, 40.

It is not clear whether the City is also trying to use the membership figures to demonstrate that the number of minority-owned construction firms in Richmond is small, and that the small number of such firms somehow is itself evidence of discrimination by the industry.[4]

If that is the City's position, a few facts are in order. According to the Bureau of Census, there were 1,563 black-owned firms in the City of Richmond in all industries in the relevant time period. U.S. Bureau of the Census, *1982 Survey of Minority-Owned Business Enterprises: Black* 88 (1985). Of those firms, there were 144 black-owned firms in Richmond in the construction industry, hardly a "small" number. Most of the black-owned firms in Richmond were concentrated in the serv-

[4] "The record in this case contains no finding on the precise number of contractors in Richmond who were minority in 1983, though . . . the number is 'quite small.' J.S. App. 7a." City Brief at 23, n.37.

ices and retail trade industries. *Id.* (*See* Appendix hereto for the various industry categories). But the fact that only a handful of the 144 black-owned construction firms decided to join the selected trade associations listed is not evidence of discrimination. The other black-owned firms may have voluntarily joined other associations that may cater to their special needs, such as the National Association of Minority Contractors Associations, the Metropolitan Business League, Richmond Minority Assistance Center, or the Virginia Minority Supplier Development Council, Inc. *See* Virginia Department of Minority-Owned Enterprises, *Minority Owned Businesses of Virginia* (1986). After all, the fact that slightly less than half of all the lawyers in America belong to the American Bar Association does not mean the ABA has discriminated against the other half. Nor does it mean that the National Bar Association which is composed primarily of black lawyers discriminates against white lawyers.

Unable to make anything out of the membership figures, the City in desperation casts a wider net at the "well documented history of racial discrimination throughout the nation's construction industry." City Brief at 23. Here is where the City's analysis falls completely apart. In an attempt to shore up the paucity of any evidence of discrimination by the local contracting industry, the City tries to use discrimination found on a *national* scale as justification for its local remedial program. The obvious defects with this tactic are at least threefold:

a. The City of Richmond is not the Congress and cannot legislate on a national scale. Any justification for its remedial plan must be based on discrimination found within its city limits, especially because the construction industry is inherently diffuse and locally based.

The City's attempt in its brief to borrow heavily on the findings made by this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), *United Steelworkers of America v.*

Weber, 443 U.S. 193 (1979), and a number of studies that show that "black workers for years have been excluded from the skilled construction trade unions" (City Brief at 23) is thus unavailing.

b. Amici do not dispute the prior judicial findings that trade and craft labor *unions* have discriminated against minorities. Hiring halls have been used by the unions to supply union workers to construction sites on a daily or project basis. If the unions exclude blacks, or if blacks become union members but are not selected for jobs at the hiring hall, they are unfairly denied the opportunity to work in the construction industry and develop their skills. This documented problem of historical discrimination by the craft unions, especially in the industrial cities of the Northeast, however, has *no* relevance to Richmond. The City has overlooked the simple but important fact that Virginia is a "right to work" state and has been one since 1947. Union membership is *not* required as a condition of employment. Va. Code Ann. §§ 40.1-58 to 69 (1986). Thus, while Virginia employers could technically enter into an exclusive hiring hall contract with a labor union, they are unlikely to do so in a right to work state such as Virginia.

c. There was *no* evidence produced at the City Council hearing of any construction company (or labor union for that matter) having discriminated against blacks. Not a single black contractor testified complaining of discrimination. Even in its *post hoc* rationalization, the City's attorneys are unable to cite in their brief to a single example of discrimination or even alleged discrimination by any of Richmond's nonminority-owned construction firms. No lawsuit, court order, administrative complaint, or even an anecdote has been cited indicating that any minority has ever been discriminated against by any Richmond-area construction company. The only case the City could cite as evidence of discrimination in the con-

tracting industry is an irrelevant 15-year-old *school* desegregation court case. City Brief at 26, n.45 (citing *Bradley v. School Board*, 462 F.2d 1058 (4th Cir. 1972)). *Amici* submit that the Fourth Circuit below was being more than charitable when it characterized the City's evidence of discrimination in the construction industry as being "spurious" and "nearly weightless."[5] 822 F.2d 1355, 1359 (4th Cir. 1987).

2. *The Comparison Between The Percentage Of The Minority Population In Richmond And The Percentage Of* Prime *Contracts Awarded To Minority-Owned Contracting Businesses Is No Evidence Of Discrimination Because It Ignores,* Inter Alia, *The Percentage Of* Subcontract *Work Awarded To Minorities And The Percentage Of Minority-Owned Contractors.*

The centerpiece of the City's proof of allegedly "identified, purposeful discrimination in Richmond's construction industry" is the mere fact that less than one percent of the City's prime contracts were awarded to minority-owned firms, whereas the population of Richmond is approximately 50 percent black. This statistic, like the membership statistic discussed above, is meaningless and deceptive for any number of reasons. The following analysis will consider some of the flaws on both sides of this equation.

a. There is no discussion as to how many times minority-owned firms have submitted bids to the City in order to begin to make any comparison. If the

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[5] Even the dissent in *Wygant* noted that there were specific and numerous valid complaints of discrimination against minority teachers by the Jackson Board of Education in the early 1970's, and that "tensions in the schools had escalated to violent levels." 106 S.Ct. 1842, 1859 (dissenting opinion by Marshall, J. joined by Brennan and Blackmun, JJ.). Nothing even remotely similar can be said of the construction industry in Richmond.

minority-owned contractors in existence do not regularly submit bids and perhaps decide to concentrate instead on private rather than public construction projects,[6] the award of the contracts to the nonminority-owned contractors who do bid on the project is not surprising, and is certainly not evidence of any discrimination in the local construction industry.

b. If minority-owned contractors do submit bids regularly but are rejected because their bids are higher than the nonminority-owned firms, that too is no evidence of discrimination. As noted earlier, the competitive bid process is inherently non-discriminatory and race neutral. Nor does such a result indicate that the local construction industry discriminated against minorities by being able to bid lower than them on a project.

c. The City's reliance on the less than one percent figure of the dollar amount of *prime* contracts awarded to minority-owned businesses is totally misleading because it fails to take into account the percentage of all public contract dollars reaching minority-owned firms *via* sub-contracts awarded by the nonminority firms. Just as it is in the City's interest to award prime contracts to the lowest bidder, so too is it in the interest of the prime contract to subcontract out certain work where feasible to the lowest bidder.[7] Viewed in this light, the record shows that the percentage of city contract dollars reaching minority-owned businesses was "seven or eight [percent] on the overall . . . [and] is in the 20's, somewhere between 17 and 22 [percent], I believe [for contracts under the Community Development Block Grants

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[6] In the construction industry, approximately 75 percent of the business is in the private sector and 25 percent in the public sector. U.S. Dept. of Commerce, *Survey of Current Business* S-7 (April 1988).

[7] Certain kinds of major construction projects such as road paving simply do not lend themselves to being subcontracted out.

(CDBG)]." J.A. at 16 (statement of City Manager Manuel Deese).

It is *amici*'s understanding that the 7 or 8 percent overall figure only accounts for the subcontract work allocated to the CDBG. In other words, the City had no figures on the dollar amount of subcontract work being given to minorities on non-CDBG work, and simply took the 20 percent work on CDBG and divided into the total amount of all contracting dollars. If the City took into account the dollar amount of subcontracts going to minorities, and assuredly there were some, the overall 7 or 8 percent figure would be higher. Thus, if the City's attempt to show discrimination is by looking at the total amount of city dollars reaching the pockets of minority-owned businesses, the more appropriate figure is the 7-20 percent figure rather than the *prime* contract percentage of less than one percent, especially where the remedy chosen is a subcontract minority set-aside program.

d. The City's comparison of prime contracts awarded to minorities with the percentage of minorities in the general population of Richmond to prove discrimination is totally inappropriate. It makes no sense whatsoever to look at the general population statistics and expect that there should be a correlation to the percentage of that group in a particular occupational field such as public construction anymore than one would expect to see a statistical similarity in any other discrete occupation. Does the fact that Richmond's population is 50 percent black mean that 50 percent of all tax attorneys in Richmond should be black, or 50 percent of all speech therapists, or 50 percent of all piano tuners? It would be a statistical oddity indeed to find each occupational category to contain the same or approximate ratio of minorities as there are in the general population. To suggest that statistical discrepancies constitute discrimination in discrete occupational categories, particularly

ones requiring ownership of the business as in this case, is pure sophistry.

If one is trying to build a discrimination case solely on statistics, and *amici* do not think it can be done in an inherently neutral competitive bidding system, the more relevant comparison is not with the general population, but as the court below noted, "between the number of minority contracts and the number of minority *contractors* . . . . " 822 F.2d at 1359 (emphasis in original). *Accord J. Edinger & Lon, Inc. v. City of Louisville*, 802 F.2d 213, 216 (6th Cir. 1986) (no evidence of statistical disparity between "percentage of qualified minority business contractors" and "percentage of bid funds" awarded); *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987).[8] *See also Hazlewood School District v. United States*, 433 U.S. 299, 308 (1977), where this Court looked at the difference between the number of those employed and the qualified labor pool, *not* the general population.

But even the comparison between the percentage of bid funds awarded and percentage of qualified minority business contractors may be an overly generous one because of the nature of the contracting system. To illustrate, assume that minorities were awarded over 40 percent of the *number* of contracts or subcontracts but those contracts were small item contracts such that in the aggregate, they account for only 10 percent of the total *dollar* amount of all contracts awarded over a period of time. Thus, a few large turnkey projects awarded competitively and nondiscriminatorily to a nonminority firm will skew the percentages if large and small contracts are lumped together. Yet the lower 10 percent figure is hardly evidence of discrimination. The Richmond Plan nevertheless guarantees minorities a right, in effect, to 100 percent of the *number* of contracts at a

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[8] Not surprisingly, the City nowhere cites in its brief, let alone attempts to deal with, the *Edinger* and *San Francisco* opinions.

minimum of 30 percent value for each separate contract. Thus, the unique features of the contracting system underscore the inherent flaws in trying to "prove" discrimination by using simplistic aggregate figures. To put it another way, in the personnel employment situation, for example, only *one* person can hold *one* position or slot at a time. Thus, there is a one-to-one relationship on both sides of the employment statistical equation. In the contracting system, however, contracts have widely differing dollar values and are not fungible.

Contracts have widely different purposes as well. Some construction contracts may be for plumbing work as in the instant case, or for the paving of public roads. Not all contractors are equipped or qualified to bid on all contracts. In the employment context, however, a teacher is a teacher (see *Wyant, supra*), or a policeman is a policeman. *See United States v. Paradise*, 107 S.Ct. 1053 (1987). Their duties and qualifications can be adjudged to be the same for each such occupation. Not so in the construction industry. Consequently, even the use of the percentage of the existing qualified minority contractors may be an inflated yardstick to use in this case.

e. Because a comparison of the percentage of the total dollar amount of contracts awarded to minority contractors with the percentage of qualified minority contractors in the Richmond area is a better indicator of the existence of any discrepancy than the use of general population statistics, the question that remains is, what is the percentage of qualified minority contractors in Richmond. The only evidence in the record is a national figure of 4.7 percent. J.A. 35 (Statement of Patrick Murphy). If this 4.7 percent figure applies to Richmond, then minority-owned firms in Richmond, which were getting at least 7 percent of the contract dollars before the Plan was adopted, were receiving a disproportionately *greater* share than their numbers would apparently warrant. Even if the percentage of the minority-owned firms

in Richmond is actually double (9.4 percent) or triple (14.1 percent) the national average, the percentage of contract dollars already awarded to such firms, *i.e.*, 7 to 20 percent, would be still within a reasonable range, considering the vagaries of the contracting system as previously described.

Thus, even if minority contractors constitute 6 percent of all the contractors, and receive only 3 percent of the dollar value of all contracts, that result cannot be called discrimination any more than it would be to say that there is discrimination against qualified firms that are owned by white males over the age of 65 because they too may constitute 6 percent of all contractors yet receive only 3 percent of the dollar value of all contracts.

Accordingly, the 30 percent figure mandated by the City not only "emerged from the mists" as the Fourth Circuit properly noted, 822 F.2d at 1360, but the figure is grossly out of line with the results one would expect in Richmond from a race-neutral contracting system.

3. *There Is No Evidence That There Even Was Any "Societal" Discrimination Against Minority Contractors.*

Not only has the City failed to show "purposeful, identified discrimination" in the construction industry in Richmond, there is no evidence or even any allegation that there was "societal" discrimination that explains the small number of minority contractors. There is no allegation, for example, that minorities, because of the color of their skin, were denied credit or loans from banks to obtain the needed capital to start up a contracting business. There is no allegation that vendors refused to rent or sell trucks or equipment to blacks so that they may equip their companies. There is no allegation that business schools or colleges denied them admission. Indeed, there is a host of federal and state laws that prohibit such discrimination.

Even the dissenting judge in the Fourth Circuit below in this case admitted that "there was no suggestion before the Council that . . . the minimal presence of minority contractors in that endeavor was caused by such 'societal' discriminatory factors as past inferior education or lack of access to social institutions." 822 F.2d at 1366 (Sprouse, J., dissenting).

Since there was no discrimination by the City, no credible evidence of discrimination by the Richmond "contracting industry," and not even allegations of "societal" discrimination, we are left with a case, which the City and their supporting *amici* may find hard to accept, suggesting no discrimination at all. Consequently, the alleged discrimination in this case is far weaker than the "societal" discrimination found in the *Wygant* case which this Court ruled was insufficient to justify a race-conscious remedial plan.

4. *There Are Numerous Nondiscriminatory Reasons To Explain The Number And Size Of Minority-Contracting Firms.*

Just as Justice Powell noted in *Wygant* that there are "numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind," 106 S.Ct. at 1848, so too in this case are there numerous nondiscriminatory reasons to explain the difference between the percentage of the minority population of Richmond and the percentage of minority-owned contracting businesses.

Unlike the task of seeking employment which requires very little capital (*e.g.*, cost of transportation to job interviews), starting one's own business, especially one in the construction industry, is a very expensive and risky proposition requiring substantial capital. A simple fact of life is that as a class of people, blacks do not have as much assets as those owned by whites. In 1984,

"[m]edian assets owned by blacks were only 9 percent of those owned by whites." D. Gilliam, "Fostering Black Enterprise," *Washington Post*, May 30, 1988, at B3 at col. 5 (citing "The Color Line and Quality of Life In America."). While the City and its supporting *amici* would no doubt quickly ascribe "racial discrimination" to that statistical disparity too, one finds that Asians, West Indians, and Ethiopians (the latter two groups having the same skin color as American blacks), fare much better in opening businesses here than U.S. Blacks. *Id.* Indeed, one may even argue that the Great Society giveaway programs of the 1960's led blacks to place undue dependence on the government, causing a decline in self-reliance, skills, and motivation so necessary for starting one's own business.[9]

The respected Booker T. Washington Foundation and other self-help black groups are trying to improve the economic status of the black community with economic education rather than through cries of "discrimination" and government handouts or quotas. In so doing, these groups are trying to identify the true causes for the low amount of black enterprise and seeking to remedy them. Charles Tate, the executive director of the Booker T. Washington Foundation stated that "Equity capital

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[9] There may be cultural differences that explain the various successes of certain groups in certain industries. As noted black scholar Thomas Sowell observed:

> Some groups that have been tremendously successful in some activities have been utter failures in other activities requiring no more talent. Even such an economically successful urban group as American Jews had an unbroken string of financial disasters in farming, while immigrants from peasant background succeeded . . . . [U]nless we are prepared to deny free choice to the supposed beneficiaries of "affirmative action," it is arbitrary social dogma to expect an even distribution of results.

T. Sowell, *Dissenting from Liberal Orthodoxy: A Black Scholar Speaks for the "Angry Moderates."* (American Enterprises Institute, Dec. 1976).

shortage in the black communities is the major reason that the level of business and economic development are low." *Washington Post, supra.* In addition, "[m]istrust of each other is a key problem . . . Blacks have traditionally shied away from pooling their money to go into economic ventures . . . ." *Id.* Even in the Washington, D.C. area with "about a million blacks . . . with a level of education and professional achievement in the black community probably unmatched in the United States, local black business ownership and black-controlled economic development are woefully small." *Id.* It is not surprising, therefore, that blacks in the Richmond area do not own a larger number of contracting businesses due to reasons having nothing to do with discrimination.

As for the viability of contracting businesses once they start, that too involves additional capital, cash flow, bonding requirements, and the like. In other words, once a black-owned business is started, it faces the same problems faced by a nonminority to keep the business viable. But in a free enterprise system, success is never guaranteed. Businesses, both black and white, struggle and oftentimes fail.

There may be a host of other nondiscriminatory reasons why blacks do not form construction companies. The very risk of such venture, combined with a profitability of less than 10 percent, may lead them into more profitable lines of self-owned business like retailing or personal services where capital requirements may also be lower. *See* Appendix hereto for a break down of black-owned firms in Richmond. Or they may be content to be an employee and rise up the ladder in their chosen career. After all, many successful corporate executives are mere employees and do not "own" the companies they work for.

In short, the statistical disparity between black-owned construction firms in Richmond, Virginia and the black population in Richmond is certainly not evidence of "pur-

poseful, identified discrimination" in the local construction industry.

II. THE RICHMOND PLAN IS NOT NARROWLY TAILORED TO REMEDY THE ALLEGED DISCRIMINATION.

Assuming that the City's meager statistics constitute firm evidence of pervasive, identified racial discrimination in the contracting industry, that alone does not mean that the City is free to set up any kind of race-conscious remedy. On the contrary, any such plan must be narrowly tailored to remedy the specific effects of the discrimination and no more. *Wygant*, 106 S.Ct. at 1849-50. In this case, the Richmond plan falls far short of satisfying this test.

A. In the first place, it is unclear precisely what the City is trying to accomplish by this plan. If they believe that the low number of minority-owned firms is due to discrimination, and that they want to increase the number of firms, then this plan does not accomplish that at all. All that this plan is designed to do is to give 30 percent of the city's contracting dollars to existing minority firms in the form of a windfall. Thus, this situation is totally unlike the remedial measures upheld in the employment context such as in *Paradise* and *Sheet Metal Workers* cases where additional minorities are necessarily brought into the workforce. Nor is there any pretense made by the City that the 30 percent set-aside program will attract new firms into the business. As noted earlier, there are many reasons that inhibit the formation of new construction firms. *Amici* doubt that a temporary set-aside program will necessarily be a sufficient inducement to blacks to start their own firms.

B. If the economic viability of all minorities in Richmond is the concern of the City, this plan certainly does not address that issue. In other words, this Plan is only concerned with the minority who owns the firm, not the

people who may be employed. Nonminority firms may employ more blacks than the minority firms such that the total amount of dollars going to all minorities as wages may actually decline because of the set-aside program. During the hearings on this plan, Councilmember Gillespie asked whether the proponents of the measure have "assessed the impact that this [plan] is going to have on employment among blacks, which is one of our most significant problems."

> MR. DEESE: I can't assess that. . . .
>
> * * * *
>
> MR. GILLESPIE: Since you don't know, and since it is a problem in our City, is it worth assessing the impact before we act on the bill?
>
> MR. DEESE: I don't think that's necessary.

J.A. at 44-45.

C. Not only does the plan neither increase the number of minority firms nor increase minority employment, giving instead a windfall to existing minority firms, but also the windfall is not even limited to minority firms in the Richmond area. During the Council hearings on this measure, representatives of the contracting industry indicated how difficult it was to locate qualified minority firms in the area. Even in the instant case, the Croson company had solicited subcontract bids from minority firms located in Pittsburgh and North Dakota. *See Croson v. City of Richmond*, 779 F.2d 181, 183, n.4 (4th Cir. 1985). It is *amici's* understanding that the current experience under the Richmond plan is that in order to satisfy the 30 percent set-aside provision, there is extensive use of minority firms located in Atlanta or Philadelphia. How does this practice allegedly remedy the alleged discrimination in Richmond? What compelling interest does Richmond have to assist minority firms in other states?

D. Another broad feature of the plan is that the 30 percent set-aside figure can be satisfied by using any

minority firm and not just one owned by blacks. Thus, firms owned by an Eskimo, Aleut, Hispanic, or Oriental would satisfy the city's plan, without a single black firm being aided.[10]

This overreaching aspect of the plan is clearly not narrowly tailored to remedy the alleged discrimination against the black community. Justice O'Connor similarly criticized the race-conscious plan struck down in the *Wygant* case that included Orientals, Indians, and other minorities as illustrative of the "undifferentiated nature of the plan. There is no explanation of why the Board chose to favor these particular minorities. . . . Moreover, respondents have never suggested—much less formally found—that they have engaged in prior, purposeful discrimination against members of each of these minority groups." 106 S. Ct. 1842, 1852, n.13 (O'Connor, J., concurring).

E. The 30 percent figure is an arbitrary number that, as previously noted, bears no appropriate relationship to the relevant class, i.e., the number of minority-owned firms. Further evidence of the arbitrariness of the percentage selected is that the Richmond Plan has set a *20* percent figure as a goal for minority contracting for all city contracts other than construction contracts. *See* Plan Article VIII-A(A), para. 2.

F. While the Richmond plan does have a waiver provision, that feature in and of itself will not salvage an otherwise overly broad remedy. Indeed, in the case at bar, Croson was denied a waiver as well as the opportunity to raise his bid to accommodate the excessive mark-up of some $7,000 offered by the minority firm, Continental Hose Company. 822 F.2d at 1357.

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[10] *Amici* note that there are only three Eskimos and two Aleuts living in Richmond, out of a population of some 220,000. U.S. Bureau of the Census, PC80-1-B48, *1980 General Population Characteristics, Virginia*, Table 15 (1982).

This restrictive use of the waiver provision is certainly not the kind discussed in the *Fullilove* case where Chief Justice Burger noted that "as to specific contract awards, waiver is available to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of past discrimination." 448 U.S. 448, 488. There is no similar provision in the Richmond Plan to prevent such windfalls going to minority firms, and as described in the following section, minority set-asides have proven to be a costly program to taxpayers and other elements of society. Accordingly, the Fourth Circuit below was correct in doubting that "any waiver, let alone the restrictive waiver provisions in this case, could cure the objectionable aspects of the Richmond ordinance." 822 F.2d 1355, 1361.

G. If the City's concern is to eliminate discrimination in the construction industry, a narrowly tailored remedy would be to simply debar all contractors from the bidding process who discriminate against minorities in employment, or who refuse to deal with minority contractors who have given them the lowest bid price on a subcontract.

Accordingly, the Plan is defective because it is not narrowly tailored in a number of respects to remedy the alleged discrimination. *Amici* submit, however, that the Court need not even address the issue of whether the Plan is narrowly tailored since the predicate finding of firm evidence of discrimination is simply lacking.

III. RACE-CONSCIOUS PROGRAMS SUCH AS SET-ASIDES ARE COUNTERPRODUCTIVE, COSTLY TO SOCIETY, AND MORALLY REPUGNANT.

The widespread use of minority set-asides by a number of cities and states has produced a wealth of evidence showing that these programs have deleterious effects on the economy and society. In addition, they are morally repugnant because they are designed to prefer certain members of society simply because of the color of their skin. In a free, competitive, color-blind society, there should be equality of opportunity, not equality of results.

In 1985, the U.S. Civil Rights Commission undertook a comprehensive study of the experience gained during a decade of the use of minority set-asides. Hearings were held on March 6-7, 1985 and are reproduced in two informative volumes entitled "Selected Affirmative Action Topics in Employment and Business Set-Asides" (hereinafter "Set-Asides"). Numerous witnesses testified on both sides of the issue, and some common sense notions of the competitive contracting system were revealed. For example, Kurt A.J. Monier of the Associated Specialty Contractors, Inc., noted that:

> Subcontractors are not and should not be selected on the basis of race, sex, or other nonrelevant criteria by any prime contractors with enough good judgment to remain in business unless such selection is mandated by government edict. In practice, the subcontractors are selected on the basis of their competitive price and ability to perform the work. [Set-asides] are nonsolutions to nonproblems that threaten to eliminate subcontractor competition on government work.

Set-Asides, Vol. 2 at 243.

Joan G. Haworth, an economist and researcher, reviewed the employment statistics between 1972 and 1982 and found that the minority share of self-employed work-

ers remained constant at 6.2 percent. In the construction industry, however, the field most targeted by set-aside programs, the minority share of self-employed workers declined from 5.8 percent in 1972 to 5.4 percent in 1982. Set-Asides, Vol. at 80-81.

The reasonable conclusion that minority set-asides provide a windfall to existing minority-owned firms rather than to help develop new minority businesses is also borne out by other studies. An investigation of the principal beneficiaries of the set-aside programs has revealed that:

> their median annual sales and after-tax profits are respectively, $741,000 and $32,500, and they are nearly as profitable as nonminority businesses of comparable size. These larger scale minority enterprises . . . have benefited most from set-asides, and they cannot—as a group—be accurately characterized as "deprived."

Set-Asides, Vol. 1 at 149 (statement of Professor Timothy Bates, Professor of Economics, University of Vermont).

This information suggests that the set-aside programs have primarily benefited wealthier minority group members—the ones least in need of government assistance.

In addition to the fact that set-asides seem to be counterproductive, there is also evidence that their negative economic impact is also felt. According to a 1979 General Accounting Office report on the public work set-aside program upheld in *Fullilove*, it was discovered that the "price quotes of minority firms averaged about 9 percent higher than normal prices." GAO, *Minority Firms on LPW Projects: Mixed Results* 18 (1979). *See also* Set-Asides, Vol .2 at 274-75 (testimony of G. Paul Jones, Jr., citing 30 percent cost differential between set-aside participant and low bidder); *id.* at 246 (statement of Kurt A.J. Monier) (citing 300 percent cost differential between

minority participant in Small Business Administration's Section 8(a) program and nondisadvantaged bidder.)

Besides being ineffective and costly to the taxpayers who pay for the government contracts, the set-aside programs necessarily impact on non-minority businesses, many of which are small and have been placed under economic pressure because of these programs. For example, Ralph D. Stout, Jr., who twice served on President Carter's White House Conference on Small Business, testified before the Civil Rights Commission about the experience of his subcontracting company, Southern Seeding Service, which performs erosion control or grassing work on the highways of North Carolina. Although he had been successful in the past in receiving bids, the set-aside programs had "literally legislated [his company] out of the marketplace." Set-Asides, Vol. 2 at 135. *See also Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works on The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act*, 99th Cong., 1st Sess. 334 (testimony of John C. Vande Velde, owner of Warning Lites of Illinois noting that because of set-asides, that his lower bid prices were not accepted and that his business's success rate in bidding on contracts dropped from about 40 percent to 3 percent from 1984 to 1985).

If the goal of society is to provide equal opportunity to minorities, the goal is best accomplished not by set-asides in the contracting industry, but by ensuring that all invitations for bids for government contracts receive the widest circulation in the minority business community. That of course is the true essence of "affirmative action", i.e., to affirmatively provide opportunities, not results, to the minority community. The City of Richmond has numerous agencies and services that provide such outreach to the minority community for which they are to be commended. Virginia was the first

state to have a Department of Minority-Owned Enterprises to provide education and managerial assistance to minorities.

However, a set-aside program is simply a quick fix that does not address the true needs of the minority business community.[11] Worse, they are nothing more than a racial quota and as such, are morally repugnant in a society professing to treat everyone as individuals rather than classifying them by the color of their skin. Such programs are even objected to by minorities who regard the preferential treatment as stigmatizing. As Professor Thomas Sowell wrote in *Black Education, Myths and Tragedies* 292 (1972):

> What all the arguments and campaigns for quotas are really saying, loud and clear, is that black people just don't have it, and that they will have to be given something in order to have something. The devastating impact of this message on black people —particularly black young people—will outweigh any few extra jobs that may result from this strategy.

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[11] *See also* P. Bell, *Blacks Must Take Responsibility For Their Own Lives*, 5 Lincoln Review, Summer 1984, at 39; P. Perlmutter, *Minority Group Responses To Prejudice & Discrimination*, 8 Lincoln Review, Winter 1988, at 21; C. Pendleton, *Affirmative Action & Individual Freedom*, 7 Lincoln Review, Summer 1986, at 23; J. Parker, *"The Time Has Come To Move Decisively Toward A Truly Color Blind Society,"* 6 Lincoln Review, Summer 1985, at 1.

CONCLUSION

This Court should reject the City's argument for what it is: fuzzy thinking and statistical voodoo to justify a politically motivated racial spoils system that is morally wrong, violates fundamental notions of fairness, and denies persons equal protection of the law. Competitive bidding in the contracting process is quintessentially nondiscriminatory.

In affirming the court below, this Court would do well to heed the suggestion of Professor William Van Alstyne:

> [O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

Van Alstyne, *Rites of Passage: Race, the Supreme Court and the Constitution*, 46 U. Chi. L. Rev. 775, 809-810 (1979).

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APPENDIX

SURVEY OF BLACK-OWNED FIRMS: RICHMOND, VA.

TOTAL OF BLACK-OWNED FIRMS:	1,563
Agricultural services, forestry, fishing, and mining	12
Construction	144
Manufacturing	12
Transportation & public utilities	98
Wholesale trade	2
Retail trade	354
Finance, insurance, & real estate	106
Selected services	690
Industries not classified	145

SOURCE: U.S. BUREAU OF THE CENSUS, 1982 Survey of Minority-Owned Business Enterprises: Black 88 (1985).